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No. 86-90

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SAN LUIS OBISPO MOTHERS FOR PEACE;
SCENIC SHORELINE PRESERVATION CONFERENCE;
ECOLOGY ACTION CLUB; SANDRA SILVER;
GORDON SILVER; ELIZABETH APFELBERG;
AND JOHN J. FORSTER,
Petitioners,

VS.

UNITED STATES NUCLEAR REGULATORY COMMISSION;
AND THE UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to The United States Court Of Appeals
for The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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I.

THE INTEGRITY OF THE COMMISSION'S EMERGENCY PLANNING REGULATIONS IS A MATTER OF EXCEPTIONAL PUBLIC IMPORTANCE

The Briefs in Opposition filed by the Nuclear Regulatory Commission ("NRC Br.") and Pacific Gas and Electric Company ("PGandE Br.") attempt to denigrate the significance of the sharply divided *en banc* decision below by characterizing it as narrowly applicable to Diablo Canyon only. NRC Br. 9; PGandE Br. 2 & n.1, 9 n.14. The importance of the issue presented,

however, goes well beyond the adequacy of the emergency plans for a single nuclear power plant, to the integrity and effectiveness of the Commission's enforcement of its mandate under the Atomic Energy Act to protect the public health and safety. The Commission itself has recognized that emergency preparedness is "an *essential* aspect in the protection of the public health and safety." "Emergency Planning: Final Regulations," Preamble, 45 Fed. Reg. 55,402, 55,504 (August 19, 1980) (emphasis added). As the four-member dissent concluded below, the *en banc* majority's decision affirming the Commission's refusal to consider earthquakes in the context of emergency planning at Diablo Canyon "invites the continuing erosion of the emergency planning standards" and "effectively nullifies emergency planning as an effort to predict what actions would be needed should an accident occur." 789 F.2d at 50, 46 (A-51, 43).[1]

This Court has held that the Commission's interpretation of its regulations may be accepted only if it "sensibly conforms to the purpose and wording of the regulations." *Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League of America*, 423 U.S. 12, 14-15 (1975) (*per curiam*).[2] The

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[1] PGandE mistakenly suggests that the only public health and safety issue raised by the decision below is the ability of the Diablo Canyon plant to withstand earthquake vibrations. PGandE Br. 6-7. In fact, the health and safety concerns presented by the Commission's decision do not involve the adequacy of the plant's seismic design, but rather the ability of the Diablo Canyon emergency plans to protect the public in the event of an accident of *any* nature.

[2] It is for this reason that the NRC's argument that the court below properly deferred to the Commission's interpretation of its own regulations (NRC Br. 11) is incorrect. When an agency's interpretation of its regulations conflicts with their purpose, its interpretation is entitled to no weight. *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Union of Concerned Scientists v. Nuclear Regulatory Commission*, 711 F.2d 370, 381 (D.C. Cir. 1983). Significantly, the Commission's interpretations of its emergency planning regulations have been rejected in two prior cases. *See GUARD v. Nuclear Regulatory Commission*, 753 F.2d 1144 (D.C. Cir. 1985) (rejecting Commission's interpretation of emergency planning regulation as irrational); *Union of Concerned Scientists v. Nuclear*

emergency planning regulation involved in this case, 10 C.F.R. § 50.47, was promulgated in the aftermath of the Three Mile Island accident, which compelled the Commission to recognize that a serious nuclear accident is possible. As a result, the Commission determined to consider "emergency planning as *equivalent to*, rather then secondary to, siting and design in public protection." Notice of Proposed Rulemaking, "Emergency Planning," Preamble, 44 Fed. Reg. 75,167, 75,169 (1979) (emphasis added). Hence, the margin of safety provided by design safeguards may not be relied upon when evaluating the adequacy of a nuclear power plant's emergency plans. "If the operation of these plants always lived up to their designers' hopes, no emergency planning would *ever* be necessary." 789 F.2d at 49 (A-49) (Wald, J., dissenting) (emphasis added).

Nevertheless, the *en banc* majority affirmed the Commission's decision primarily by relying upon the purportedly low probability of a nuclear accident. The majority argued that because design safeguards make *any* nuclear accident a remote possibility, the likelihood (1) that an accident will be initiated by an earthquake, and (2) that an accident will occur simultaneously with an earthquake, is too remote to justify consideration in emergency planning. *Id.* at 37-42 (A-25-35). However, as the dissent below correctly observed, consideration of the probability of an accident is at odds with the basic purpose of the emergency planning regulations; "emergency planning starts from the assumption that an accident has already occurred." *Id.* at 49 (A-50). Neither PGandE nor the *en banc* majority ever respond to this argument.

The NRC mistakenly asserts that petitioners would have the Commission consider "every conceivable emergency situation," no matter how unlikely, claiming that acceptance of this position would transform emergency planning hearings into "an open-

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Regulatory Commission, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied sub nom. Arkansas Power and Light Co. v. Union of Concerned Scientists*, ___ U.S. ___, 105 S.Ct. 815 (1985) (vacating Commission's emergency planning rule).

ended exercise in creative speculation." NRC Br. 13.[3] However, petitioners merely seek consideration of the single issue that has always been the central focus of concern at Diablo Canyon—seismic safety.[4] The Commission cannot, consistent with its own regulations, single out a particular accident scenario, and deny a party the right to contest the adequacy of an emergency plan *exclusively* on grounds that the plant's design renders it unlikely that such an accident would occur. Taken to its logical conclusion, the Commission's reasoning would result in no emergency planning at all.[5]

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[3] The NRC's argument addresses only the Commission's refusal to consider the possibility of an earthquake-*initiated* accident. The majority opinion, however, also relied heavily on the low probability of an accident in constructing its elaborate mathematical calculation of the likelihood of a *simultaneous but independently caused* accident and earthquake. 789 F.2d at 38-40 (A-26-31). Neither the NRC not PGandE acknowledges that in so doing, the court below again ignored the fundamental principle of emergency planning: "the assumption that an accident—unthinkable as it may be—*will* occur." *Id.* at 49 (A-49) (Wald, J., dissenting) (emphasis original).

[4] The NRC itself observes that more than 2,000,000 hours were spent *re*analyzing and *modifying* the plant's design to withstand earthquake forces. NRC Br. 5.

[5] The NRC's additional argument—that the Commission's siting, design and construction regulations specifically require evaluation of seismic considerations, while its emergency planning regulations do not (NRC Br. 11-12)—simply begs the question. The issue here is not whether the requirements are different, but whether the Commission may rely exclusively on the margin of safety provided by siting, design and construction, in choosing to limit the scope of emergency planning hearings.

II.

THE DECISION BELOW CONFLICTS WITH THE STANDARDS ESTABLISHED BY THIS COURT FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

Respondents' principal argument in support of the decision below is that the Commission, relying on its technical expertise, drew a line between frequently occurring and infrequently occurring natural phenomena, and properly excluded the latter from consideration in emergency planning. NRC Br. 9-10; PGandE Br. 8, 9 n.15. However, respondents—like the majority below—fail to point to any evidence in the record that rationally supports the Commission's decision regarding where that line should be drawn. In apparent recognition of the fundamental flaw in the Commission's determination, the *en banc* majority constructs elaborate probability calculations not relied upon by the Commission, and affirms the decision on that basis. But imposition of such a *post hoc* rationale violates the most basic principles of judicial review.[6]

The Court of Appeals majority accepts *in toto* the Commission's unadorned conclusion—lacking any support in the record—that earthquakes occur too infrequently to require specific consideration in emergency planning. As the dissent correctly pointed out, however, the majority was unable to explain how the Commission could rationally have found that earthquakes were too infrequent to warrant consideration, despite its evaluation in this case of the effects of similarly infrequent phenomena, such as a once-in-a-hundred-years flood. 789 F.2d at 55-57 (A-62-65). Respondents argue that earthquakes are far less likely to occur than fog or heavy rain, but never mention the Commission's

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[6] Respondents' suggestion that the issue presented here is whether the Commission was required to hold additional hearings solely to address the effects of earthquakes on emergency response is misleading. NRC Br. 13; PGandE Br. 1, 2. The issue is not whether the Commission is *required* to consider the effects of earthquakes, but whether the Commission had some rational basis for its decision to *single out* earthquakes, precluding their consideration in ongoing hearings on emergency response.

consideration of less frequently occurring phenomena. NRC Br. 8 & n.6; PGandE Br. 8.

In the alternative, the *en banc* majority held that the Commission's decision may be affirmed because of the remote likelihood of a simultaneously occurring earthquake and radiological accident, and in support of that holding offered extensive probability calculations. Despite the fact that such calculations were never performed by the Commission, respondents argue that they were based on the rationale explicity relied upon by the Commission. NRC Br. 14-15; PGandE Br. 10. PGandE goes further and suggests that a remand would be meaningless because it would simply require the Commission to "perform multiplication" based on evidence already in the record. PGandE Br. 11. But contrary to respondents' claim, the Commission never even suggested that the probability was remote that Diablo Canyon would experience "a simultaneous occurrence of an earthquake and an independently caused radiological release." *Id.* at 10. The text of the Commission's only discussion of this point reads as follows:

> There remains only the possibility of a contemporaneous occurrence of both a radiological release . . . and an earthquake . . . . With one exception, the focus [in emergency planning] has always been on frequently occurring natural phenomena. The Commission believes . . . that earthquakes of sufficient size to disrupt emergency response at Diablo Canyon would be so infrequent that their specific consideration is not warranted.

Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-12 (1984) (B-4-5) (footnote omitted). Thus, the Commission's rationale rested *exclusively* on the purported infrequency of earthquakes; the multiplication of that frequency by the likelihood of an accident was no more than a *post hoc* rationalization, developed by the Court of Appeals majority to remedy the Commission's failure to justify its bald assertion that earthquakes are less frequent than

other similarly infrequent phenomena considered at Diablo Canyon and other nuclear plants.[7]

Finally, respondents attempt to justify the Commission's argument—accepted by the majority below—that the specific consideration given to other natural phenomena "implicitly" demonstrates that the Diablo Canyon emergency plans are sufficiently "flexible" to respond to the purportedly similar effects of an earthquake. NRC Br. 6, 13 n.9; PGandE Br. 10-11. But the Commission itself has rejected precisely this claim, observing that

> the capability of the surrounding population to respond to an accident initiated by a severe external event, such as an earthquake or hurricane, would differ significantly from the capability to respond to other accidents.

Consolidated Edison Co. (Indian Point), 21 N.R.C. 1043, 1058 (1985). Moreover, as the Court of Appeals dissent correctly observed, "[t]he Commission cannot assume . . . flexibility without any record evidence and parade it as an excuse for not allowing relevant evidence about the disruptive effects of earthquakes into the record." 789 F.2d at 59 (A-71) (citation omitted). Thus, the majority's "inherent flexibility" argument, like its *post hoc* probability calculations, cannot remedy the Commission's failure to offer "a rational connection between the facts found and the choice made."[8]

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[7] The NRC also seeks to salvage the Commission's failure to provide a rational basis for its decision by claiming that the determination involved technical analysis "at the frontiers of science and within the Commission's area of special expertise." NRC Br. 14. But in the absence of any record evidence regarding frequency of occurrence, the question whether earthquakes occur more or less frequently than other natural phenomena is hardly a "technical" matter. Indeed, when it suits its purpose, the NRC contends that this is nothing more than a determination of "what common sense shows." NRC Br. 9, quoting *San Luis Obispo Mothers for Peace*, 789 F.2d at 44 (A-38).

[8] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual*, 463 U.S. 29, 52 (1983).

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari to the District of Columbia Circuit should be granted.

Respectfully submitted,

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